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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TYLER BRENNEISE, ALLISON BRENNEISE AND ROBERT BRENNEISE Plaintiffs, v. SAN DIEGO UNIFIED SCHOOL DISTRICT Defendants.	Case No.: 08 CV 0028 WQH (WMc) FIRST AMENDED COMPLAINT (1) Appealing Portions of a Decision of California Office of Administrative Hearings; (2) For Attorneys Fees as Prevailing Party Under 20 U.S.C. § 1415(i)(3); (3) For Violation of the IDEA; and (4) For Attorneys' Fees as Prevailing Party in Compliance Complaint.

PRELIMINARY STATEMENT

1. This action is brought pursuant to the Individuals with Disabilities Education Act ("IDEA") 20 U.S.C. §1400 *et seq.*

JURISDICTION, VENUE AND EXHAUSTION

2. This is a civil action over which this court has original jurisdiction under 20 U.S.C. § 1415(i)(3)(A) and 28 U.S.C. § 1331, 1343(a)(3) and 1343(a)(4). This court has jurisdiction to hear pendent state claims under the doctrine of supplemental jurisdiction set forth at 28 U.S.C. 1367.

3. Venue in this court is proper under 20 U.S.C. § 1391(b) because the defendant is located within San Diego County, which is within the jurisdiction of this district and all of the events that are the subject of this complaint took place within the jurisdiction of the district.

4. The original complaint was timely under Cal. Educ. Code § 56505(k).

5. Plaintiffs have exhausted all remedies available to them under the IDEA as required by 20 U.S.C. § 1415(i)(2) and, in any case, should be excused from further exhaustion on the grounds that further exhaustion would be futile.

PARTIES

6. Plaintiff, TYLER BRENNEISE ("Student") is a citizen of the United States, who at all relevant times herein, resided with (and continues to reside with) his parents in San Diego, California, which is located within San Diego County and the boundaries of the San Diego Unified School District.

7. Student's parents, ALLISON BRENNEISE ("Student's Mother") and ROBERT BRENNEISE ("Student's Father") are citizens of the United States, who at all relevant times herein, resided within San Diego, California, which is within San Diego County and the boundaries of the District.

8. Defendant SAN DIEGO UNIFIED SCHOOL DISTRICT ("SDUSD" or "District") is a public school district organized and existing under the laws of the State of California and is located within San Diego County. At all times relevant herein, SDUSD

was the local education agency responsible for providing Student with full and equal access to the public education programs and activities it offers in compliance with the requirements of state and federal law, and for providing Student, who is eligible for special education, with a "free appropriate public education" ("FAPE") under the IDEA and the California Education Code, for which SDUSD receives federal financial assistance.

PROCEDURAL HISTORY & FACTUAL BACKGROUND

9. On or about November 29, 2006, on behalf of SDUSD, Elizabeth Estes, Esq. and Sarah Sutherland, Esq. of Miller Brown & Dannis, filed a request for due process hearing ("Due Process Hearing") with the Hearing Office.

10. On or about December 6, 2006, the Hearing Office issued a Notice of Due Process Hearing and Mediation in the matter of *San Diego Unified School District v. Tyler Brenneise*, OAH Case No. N2006120002, setting the hearing for December 29, 2006.

11. On or about December 15, 2006, SDUSD filed a Motion to Amend and Amended Due Process Request. The Hearing Office granted the motion on or about January 9, 2007.

12. On or about January 29, 2007, Student cross-filed a request for due process hearing with the Hearing Office. On that day, Petitioners filed a motion to consolidate its newly-filed request for due process with the pending due process case and a motion to vacate the due process hearing date and request a trial setting conference.

13. On or about January 30, 2007, the Hearing Office issued a Notice of Due Process Hearing and Mediation in the matter of *Tyler Brenneise v. San Diego Unified School District*, OAH Case No. N2007010848.

14. On or about February 2, 2007, the Hearing Office issued an Order granting Petitioners' Motion for Consolidation.

15. On or about February 16, 2007, the Hearing Office issued an Order setting the Due Process Hearing in the consolidated cases for May 14-18, May 21-25 and May 29-June 1, 2007, and the telephonic Prehearing Conference for April 26, 2007

16. The Due Process Hearing in the consolidated cases (OAH Case Nos. N2006120002/N2007010848) was held in San Diego, California before Administrative Law Judge ("ALJ") Susan Ruff on May 14-June 1, June 11-13, June 19-20, and July 11-20, 2007.

17. On or about October 3, 2007, the Hearing Office issued its Decision ("OAH Decision"), which was served via US Mail on October 5, 2007, and received by the Parties on October 8, 2007. A true and correct copy of the OAH Decision is attached hereto as Exhibit A and incorporated herein by reference.

18. The OAH Decision identifies a total of 18 separate issues falling into four broad categories: Issues Related to Assessments; Issues Related to the August 30, 2006 Proposed IEP; Issues Related to the December 4, 2006 Proposed IEP; and Issues Related to Both IEPs.

19. The OAH Decision held that the Student prevailed with respect to issue 10 (Related to the December 4, 2006 Proposed IEP) and issues 14 and 15 (Related to Both IEPs). The District prevailed as to the remaining issues.

FIRST CLAIM FOR RELIEF

(APPEAL OF CERTAIN FINDINGS OF FACT

AND CONCUSIONS OF LAW SET FORTH IN THE DECISION)

20. Plaintiffs reallege and incorporate by reference as though fully set forth herein, paragraphs 1-19, inclusive, of this complaint.

21. Plaintiffs are a "party aggrieved" by the OAH Decision, as that term is used in 20 U.S.C. § 1415(i)(2)(A) and Cal. Educ. Code § 56505(k) in that the OAH Decision erred in holding in favor of the District with respect to issues 1-5 (Issues Related to Assessments); issues 6-9 (Issues Related to the August 30, 2006 Proposed IEP); issues

11-13 (Issues Related to the December 4, 2006 Proposed IEP) ; and issues 16-18 (Issues Related to Both IEPs).

SECOND CLAIM FOR RELIEF

(AGAINST SDUSD FOR RECOVERY OF ATTORNEYS' FEES UNDER 20 U.S.C. § 1415(i)(3)(B))

22. Plaintiff realleges and incorporates by reference as though fully set forth herein, paragraphs 1 - 21, inclusive of this complaint.

23. As prevailing party in the proceeding before the Hearing Office, plaintiffs are entitled to reimbursement of the reasonable attorneys' fees incurred during the course of those proceedings under 20 U.S.C. § 1415(i)(3)(B), as well as for attorneys' fees incurred in seeking those fees as part of this complaint.

THIRD CLAIM FOR RELIEF

(AGAINST SDUSD FOR VIOLATION OF THE IDEA)

24. Plaintiff realleges and incorporates by reference as though fully set forth herein, paragraphs 1 - 23, inclusive of this complaint.

25. The OAH Decision determined that Student's December 4, 2006 IEP, as modified by the OAH Decision's Order, should be implemented.

26. The OAH Decision modified Student's December 4, 2006 IEP to include the following language under the heading of health nursing services (page 2 of IEP): "G-Tube feeding will be scheduled to occur daily in the nurse's office. A school nurse will be present and will personally assist the student with the student's G-Tube feeding. The G-Tube feeding will occur at the time(s) and in the manner designated in a doctor's order form from Student's current physician. Student's mother will be responsible for providing the school nurse with a current doctor's order specifying the time(s) of the G-Tube feeding and the amount of formula to be used in the feeding(s), and for providing updated doctor's orders whenever there is any change in the G-Tube feedings."

27. The OAH Decision further modified Student's IEP transition plan in the December 4, 2006 IEP to provide that: 1) "Student's mother as a participant in each of

the collaboration meetings described in the transition plan . . .;" and 2) "until Student reaches phase four of the transition plan, Student's District-funded DIS services will continue with his current NPA providers and at his current levels of service, except for the services of ACES."

28. On November 7, 2007, over a month after the OAH Decision was issued on October 3, 2007, the District filed a Motion for Clarification of the OAH Decision with OAH asserting that the OAH Decision was unclear with respect to the District's obligation to provide Student with Occupational Therapy ("OT") services from his then current OT provider.

29. On November 21, 2007, ALJ Susan Ruff denied the District's Motion for Clarification, asserting that the District's contention that the OAH Decision was unclear was not well taken and reiterating her order that the District provide Student with OT services from his then current OT provider.

30. With respect to the transition plan, the District failed and refused to comply with the OAH Decision, even after OAH's Order Denying Motion for Clarification, because, *inter alia*,: 1) the District failed and refused to continue to provide Student with OT services from his then current OT provider; and 2) the District failed and refused to provide Student with his then-current DIS services at his then-current levels of service.

31. With respect to Student's G-Tube feedings, the District failed and refused to comply with the OAH Decision by refusing to implement Student's December 4, 2006 IEP as modified by the OAH Decision in that the District failed and refused to ensure the presence of a school nurse to personally assist with Student's G-Tube feedings.

32. As a result of the District's failure and refusal to comply with the OAH Decision, Student has been unable to attend school and thus, continues to be denied a FAPE in violation of the IDEA.

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FOURTH CLAIM FOR RELIEF

(AGAINST SDUSD FOR ATTORNEYS' FEES IN CONNECTION WITH A CDE COMPLIANCE COMPLAINT)

33. Student and his parents filed a request for a Compliance Complaint Investigation with the California Department of Education ("CDE") on or about July 31, 2006, resulting in a CDE Investigation and Compliance Report S-008-06/07.

34. On November 1, 2006, the CDE issued its report detailing the results of its investigation. The CDE later issued two additional amended reports on November 3 and November 7, 2006.

35. The CDE's November 7, 2006 Second Amended Compliance Complaint Report found Defendant non-compliant for failing to implement Student's ESY IEP, and ordered Defendant to provide Student with compensatory education in the form of 24 hours of English Language Arts instruction and 80 minutes of Adapted Physical Education ("APE") instruction.

36. On October 26, 2007, Plaintiffs' counsel sent a formal request to Defendant's counsel seeking payment of the attorney's fees associated with Plaintiffs' successful Compliance Complaint, pursuant to the Ninth Circuit's holding in *Lucht v. Molalla River Sch. Dist.*, 225 F. 3d 1023 (9th Cir. 2000), *aff'd P.N. v. Seattle Sch. Dist.*, 474 F. 3d 1165, 1169 (9th Cir. 2006). Defendants have refused to pay such fees.

37. Because Student was the prevailing party with respect to the Compliance Complaint, his Parents are entitled to be reimbursed for reasonable attorneys' fees incurred in connection with that claim.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment as follows:

On Plaintiffs' First Claim for Relief:

38. Declare that in addition to being named the "prevailing party" as to issues 10, 14 and 15, Petitioner is the "prevailing party" with respect to the aforementioned issues (*i.e.* issues 1-9, 11-13, and 16-18).

39. Award compensatory education.

40. Order the District to reimburse Petitioner in the amount of ten thousand three hundred dollars $10,300 for costs incurred in connection with various Independent Educational Evaluations obtained by Parents.

On Plaintiffs' Second Claim for Relief:

41. Award reimbursement for reasonable attorneys fees and costs incurred in connection with the proceedings before the Hearing Office in an amount as determined in the discretion of this court as authorized by 20 U.S.C. § 1415(i)(3)(B).

On Plaintiffs' Third Claim for Relief:

42. Award compensatory education.

On Plaintiffs' Fourth Claim for Relief:

43. Award reasonable attorneys' fees incurred in connection with the CDE Compliance Complaint.

On All Claims for Relief:

44. Award reasonable attorneys' fees and costs incurred in connection with the current proceeding.

45. For such additional relief as the court determines is appropriate.

Dated: March 12, 2008

Respectfully submitted,

Wyner & Tiffany
ATTORNEYS AT LAW

By: /s/ Steven Wyner
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of 18 and that I am not a party to this action. On March 10, 2008, I served this First Amended Complaint on the San Diego Unified School District by serving their counsel of record electronically, having verified on the court's CM/ECF website that such counsel is currently on the list to receive emails for this case, and that there are no attorneys on the manual notice list.

Dated: March 12, 2008 /s/ Dana H. Wilkins